Supreme Court, U.S.
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No. ___ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

WILLIAM DAVID MUSAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Government may premise the materiality element of a false statement charge on the defendant's statement having a natural tendency to influence law enforcement by requiring the acquisition of a search warrant, that is, to comply with the Constitution? Or does materiality have a legal threshold that requires the statement to be within the Government's central query?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were William David Musar, Defendant-Appellant, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

William David Musar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is not reported but may be found at 405 Fed. Appx. 857 and 2010 WL 5186672 and is reprinted at App. 3a. The judgment of the United States District Court for the Western District of Texas is not reported but is reprinted at App. 23a, along with the court's opinion on motion for new trial, App. 14a, the indictment, App. 9a, and the jury's verdict, App. 12a.

JURISDICTION

The judgment of the Fifth Circuit was entered on December 21, 2010. App. 1a. A petition for rehearing en banc was denied on February 1, 2011. App. 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1001(a): "Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

***

(2) makes any materially false, fictitious, or fraudulent statement or representation;

***

shall be fined under this title, imprisoned not more than 5 years . . . or both . . . ."

The Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Bill Musar is a Midland, Texas, businessman who runs a construction company, and as a side business owns a chain of self-storage facilities, Homeport Storage. Before this case he had no criminal record, nor was he the target of any criminal investigation. He was, instead, the employer and occasional landlord of a college student arrested for drug possession. On Friday, June 5, 2009, after a confidential informant tipped an Odessa police officer, law enforcement arrested Mitchell Block for possession of 50 doses of ecstasy and a small amount of marijuana and incarcerated him in Odessa. Upon Block's arrest, he gave the police his home address, 3806 West Loop 250 in Midland, which was the address of a Musar-owned self-storage facility on I-20. In the days immediately following his arrest law enforcement did not seek to search Block's residence.

On June 10, while Block was in jail, the police received a tip from the same confidential informant that Block had a "marijuana grow" operation in a storage facility "on the loop." (In Midland-Odessa, I-20 is known as the loop.) Local law enforcement, accompanied by a Drug Enforcement Agency ("DEA") agent, went to the address that afternoon eventually contacting Musar. After asking whether Block had a "storage unit," which he did not, law enforcement asked for permission to search the premises or run a K-9 unit around the facility. While Block did not have a "storage unit," he had lived in a studio apartment above a private storage area used by Musar's employees. Musar refused this search request telling the officers he wished to consult with

his attorney first and asked that the officers get a search warrant.

By June 24, a grand jury indicted Musar on two counts of making a false statement to a federal agent. *See* 18 U.S.C. § 1001(a)(2). Count I charged Musar with making a false statement on June 10 by telling DEA agents that the "only part of the Homeport storage facility to which Mitchell Block has access was a storage area for supplies." App. 9a. Count II charged Musar with making a false statement on June 12 by telling agents that Block had no keys to the Homeport storage facility. App. 10a.

At trial, the parties disputed materiality and exactly what Musar's answers were to exactly what questions. The only June 10 communications Musar had with law enforcement were two phone calls: one with the DEA agent, Conan Becknell, and a brief conversation with a Midland municipal policeman, Russell Mitchell, who was part of the local drug task force. Becknell testified that Musar told him Block had no "storage unit" but was an employee and did have access to private storage areas used by Musar's employees. He did not ask if Block lived at the facility. Mitchell testified vehemently that Musar had lied by stating that Block did not live at the facility and had never lived there. Contemporaneous police reports had no notation of any such statement. Musar maintained that because the agents had repeatedly asked about "rental units," in the larger context of the conversation he believed that the question about the "Homeport storage facility" only inquired about the commercial rental units and not the apartment which had a separate entrance through one of the private storage "lock ups" to which

he did tell the agents Block had access. Further, Musar testified he believed Block had moved out of the apartment shortly before he was arrested.

The jury found Musar guilty on both counts after a short deliberation. Musar moved for a judgment of acquittal at the close of the Government's case and again at the end of the trial, arguing in part that there was no evidence that any false statement by Musar was material as the agents were free to obtain a warrant to search the premises regardless of what Musar said or did not say to them.

Although the trial was on the two false statement charges alone, there was significant testimony and exhibits about Block's "marijuana grow" operation at the apartment, such that it was. The trial court had granted a motion in limine to block information that Musar was involved in or had knowledge of the "marijuana grow," but at trial, over Musar's losing and then fading objections, the court let in copious descriptions of Block's drug activities, purportedly to establish the agency jurisdiction element of the charge — even though Musar did not dispute that element. The Government repeatedly emphasized the drug paraphernalia found and the specter of "cartel violence," implying that Musar knew about Block's activities and was trying to cover them up.

In a *per curiam* decision on the summary calendar, the Fifth Circuit found that the admission of evidence regarding the marijuana growing activities had little probative value to this false statement case, but even if outweighed by unfair prejudice, its admission was harmless error. App. 5a. Likewise, the Court found the admission of evidence

regarding Musar's statement that there could not have been a growing operation because he would have noticed an increase in the utilities bill was harmless error. App. 4a-5a. The Court rejected Musar's argument that there was insufficient evidence of a false statement that Block only had access to a small storage area at the "Homeport storage facility" because he understood the question to not include the separate apartment on the property. App. 5a. However, the Court agreed that there was no evidence that Musar made the statement charged in Count II and vacated that count. App. 5a-6a.

On petition for rehearing the Court did not review Musar's argument that the materiality element of the false statement charge could not be, as it was here, premised on law enforcement having to obtain a search warrant. *See* App. 7a-8a.

REASONS FOR GRANTING THE PETITION

This petition challenges a fundamental error by both law enforcement and the courts below: relying on law enforcement having to seek a search warrant as basis for the materiality element of a false statement charge.

The Government had the burden to establish that any falsehood told by Musar was material to the agency's inquiry. However, the arguments as to materiality the Government offered at trial centered on the statements requiring the agents to obtain a search warrant to search the facility. Compliance with the Fourth Amendment cannot serve as the basis for the materiality of falsehoods as law

enforcement is always required to comply with constitutional safeguards, no matter what witnesses say or do not say.

Further, the false statement statute was not intended to punish trivial falsehoods or to expose people to criminal liability for peripheral statements to an investigator particularly when ambiguous questions are asked. Section 1001 should not stretch beyond the bounds Congress intended and empower overzealous law enforcement or prosecutors to punish a minor misstatement more severely than the wrongdoing itself. Here, law enforcement questioned a business owner about the extent to which his employee had access to the premises. The owner exercised his (while mindful of his customer's) Fourth Amendment rights and told law enforcement to get a warrant or wait for him to consult with his attorney. Musar's answers, even if untrue, could not legally be "material" to the agency's investigation into drug trafficking by Block when the only theoretical consequence of any natural tendency to influence the agents' decision was that law enforcement had to seek a search warrant and comply with the Constitution. This case exposes the potential abuses of Government power and provides the very nightmare scenario that worries critics of the broad application of the false statement statute. This Court should grant this petition and resolve the tension between the materiality element and the protections of the Fourth Amendment.

I. Congress never intended the statute to have such far-reaching consequences; thus, the creeping jurisprudence broadening the law should be curtailed.

A. While Congress has broadened the statute's reach, this Court has recognized the law was never intended to criminalize trivial or immaterial statements.

Members of this Court have repeatedly reviewed the statutory evolution of Section 1001. *See Brogdan v. United States*, 522 U.S. 398, 408-18 (1998) (Ginsburg, J, concurring); *United States v. Yermian*, 468 U.S. 63, 76-83 (1984) (Rehnquist, J. dissenting). In seeking to stay faithful to legislative intent, Justices Rehnquist and Ginsburg identified the potential problems with broad application of the false statement statute, foreshadowing the facts and problems this petition presents.

The false statement statute, now Section 1001 of Title 18, began during the civil war to curtail and punish false monetary claims against the government. *Brogdan*, 522 U.S. at 412 (Ginsburg, J, concurring). Over the decades, the statute has been expanded to include non-monetary deceits and certain statements to the judicial and legislative branches, but courts have been reluctant to read it broadly as it has the potential to allow prosecutors to "manufacture crimes" — which is manifestly not the function of law enforcement. *Id.* at 408, 414 (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958)).

Congress last made sweeping changes to the statute in 1934, prompted by schemes that

proliferated during the New Deal, dropping the Civil War-era pecuniary requirement, and broadening the jurisdictional provision to "any matter within the jurisdiction of any department, establishment, administration, agency, office, board or commission of the United States." *See Yermian*, 468 U.S. at 80 (citing 78 Cong. Rec. 3724 (1934)) (Rehnquist, J., dissenting). Congress intended to protect the Government from the affirmative, aggressive, and voluntary actions of persons which have the "tendency and effect of perverting normal and proper governmental activities and functions." *Brogden*, 522 U.S. at 413 (quoting *Paternostro v. United States*, 311 F.2d 298, 302 (5th Cir. 1962)) (Ginsburg, J. concurring). The previous incantation and legislative purpose was such that inclusion of oral statements was "almost an accidental consequence" and making the legislative purpose quite far removed from statements made in informal interviews initiated by the Government. *Id.* at 413 (citation omitted). In his review of the statute's evolution, Justice Rehnquist found it highly unlikely that "without so much as a hint of explanation" Congress would have changed the statute from one intended to deter "deliberate deceit" to one criminalizing "the making of even the most casual false statements so long as they turned out, unbeknownst to their maker, to be material to some federal agency function." *Yermian*, 468 U.S. at 82 (Rehnquist, J., dissenting).

In 1996, Congress clarified the scope of the jurisdictional provision of Section 1001 in reaction to the this Court's decision in *Hubbard v. United States*, 514 U.S. 695 (1995), to ensure that the statute applied to all three branches of government where

appropriate. H.R. REP. NO. 104-680, at 2 (July 16, 1996). The legislation adopted the judge-made application of the materiality element by writing it into the text of the statute while resolving a conflict over whether materiality only applied to false documentary statements. *Id.* at 8. Otherwise, Congress did not intend for the amendments to change any case law on materiality. *Id.* Thus, Congress explicitly adopted and endorsed the judge-made materiality element. Shortly before the *Hubbard*-inspired amendments, this Court found that, as with any element of a criminal charge, the materiality element is a question for the jury. *United States v. Gaudin*, 515 U.S. 506 (1995).

When Congress amended Section 1001 in 1996, it was careful to do so in a way to avoid conflict with other fundamental constitutional rights such as the right to petition the government, carving out communications with the legislative and judicial branches that were protected by other rights. H.R. REP. NO. 104-680, at 4-5 ("The Committee believes that the scope of criminal law should be sufficiently clear as to in no way discourage the exercise of constitutional rights . . . ."). The law, by common sense and Congressional intent, must be applied with due respect for constitutional rights. Consequently, the DEA decision potentially affected by Musar's statements cannot be whether or when to obtain a search warrant.

The concept of materiality is a legal one, first constructed by the courts then codified into Section 1001. *See United States v. Elashyi*, 554 F.3d 480, 497 (5th Cir. 2008) (noting the "judge-made limitation of materiality"); False Statements Accountability Act of

1996, Pub. L. 104-292, § 2, 110 Stat. 3459 (1996) (codifying "materiality" into the statute). While a jury question after *Gaudin*, the materiality of a false statement still has some legal threshold and cannot be met by a response to any question law enforcement might ask no matter how peripheral to its investigation or when a statement causes federal agents to merely comply with the Constitution. A contextually ambiguous question, a bad cell phone connection, or a misunderstood answer can all lead to charges and conviction under the statute if materiality knows no practical bounds. In *Brogden*, Justice Ginsburg acknowledged the Solicitor General's recognition that Section 1001 could be used to "escalate completely innocent conduct into a felony." 522 U.S. at 411. The materiality element shuld be a the natural check on that danger.

B. Now codified, materiality is still judge-made and should be modified to reinforce the law's intent.

The allegedly false statement must matter to the context of the function and central inquiry of the agency in question. Thus, if an investigation is at issue, that materiality should be framed by the investigation's goals. The statement must be "'material' to the Government inquiry. *Gaudin*, 515 U.S. at 509. As the jury here was charged, for a statement to be material, it must have a natural tendency to influence or is capable of influencing a decision of the agency. *Kungys v. United States*, 485 U.S. 759, 771-72 (1988). *Kungys* concerned an immigration denaturalization proceeding under 8 U.S.C. § 1451(a), and reasoned:

> We think it safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had the natural tendency to affect, the official decision. The official decision in question, of course, is whether the applicant meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified.

485 U.S. at 771-72. *Gaudin* expanded and simplified that analysis in the course of reasoning why materiality is a question for the jury by noting that determining materiality requires review of two historical facts to reach the third query or ultimate question: (1) what statement was made? and (2) what decision was the agency trying to make?, then (3) was the statement material to that decision? *Gaudin*, 515 U.S. at 512. While illuminating the logical point, this formulation does not always function well in practice when applied literally and without any context. Without boundaries, such as that *Kungys* articulated for denaturalization cases, how the second question is framed will always determine the ultimate answer. If a statement could "naturally influence" a federal agent in any context for any reason, then even the most trivial and irrelevant statements are subject to criminal liability. In such a regime, a citizen would be foolish to ever speak to law enforcement at all. But if the question must be directed to the core investigation — or at

least not in conflict with the Fourth Amendment — then the materiality element will have some substantive meaning. Here, law enforcement was investigating drug trafficking and possession. The question which Musar answered — what parts of Homeport Storage Block could access — was far afield from that central object of Government inquiry. At any trial about Block's activities, had law enforcement testified about Musar's supposed lies, the testimony would have been inadmissible as hearsay. But by charging him with making a false statement, his informal answers were transformed so that law enforcement could freely testify as to the unverified questions and answers.

C. Other statutes containing a materiality element have safeguards against the law's misapplication built into their text and jurisprudence, but the current application of the false statement statute still allows for abuse.

Other statutes that contain a parallel materiality requirement carry safeguards not present in law enforcement's current application of the false statement statute. Perjury requires a statement made under oath or a written statement explicitly made under penalty of perjury. 18 U.S.C. § 1621. The same is true for falsities stated to a grand jury or court. 18 U.S.C. § 1623(a). *See Kungys*, 485 U.S. at 769-60 (discussing common law antecedents to materiality and the multiple statutes that embody the concept). Other statutes containing the materiality element have provisions that apply a context relevant to the Government's central query and purpose. The revocation of naturalized

citizenship also contains a materiality requirement, but requires that the statement be made as part of the procurement of citizenship; that is, be made in a context material to the benefit sought. 8 U.S.C. § 1451(a). The false statement statute has no such safeguards. Instead, an oral statement made by an individual who is not seeking a benefit from the Government and is not the target of any investigation may still be subject to felony charges based on a passing or informal comment unless the materiality element focuses the crime's parameters. Thus, unless the materiality element provides some legal threshold, any communication with federal agents (or, as in this case, municipal police working with federal agents) becomes a potential felony if the Government chooses to use its power to punish that particular speaker. *See United States v. Ehrlichman*, 379 F. Supp. 291 (D.D.C. 1974) (refusing to invoke § 1001 to punish a lie to the FBI as the statute may punish as harshly as perjury, but does not contain the safeguards of that statute such as a strict rule of materiality or a transcript or memorandum of the statement).

Unlike perjury, the false statement statute may punish oral and unrecorded statements. Typically, ambiguous questions cannot support a criminal charge. *United States v. Boskic*, 545 F.3d 69, 89-93 (1st Cir. 2008); *United States v. Farmer*, 137 F.3d 1265 (10th Cir. 1998). Nor may literally true but unresponsive answers be the basis of a criminal conviction. *Bronston v. United States*, 409 U.S. 352 (1973). "Precise questioning is imperative as a predicate for the offense of perjury." *Id.* at 362. But for the offense of making a false statement, under

current practice, ambiguous questions and punishment of literally true answers is fair game.

II. Materiality applied without any agency context creates too flexible a concept and opens the door to abuse by overzealous and even impatient law enforcement.

Section 1001 as currently applied has become too flexible a tool and that undermines the clarity of not only the materiality element but also *mens rea*. *See United States v. Moore*, 612 F.3d 698, 702 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (warning of the "ever-metastasizing § 1001"). Here, law enforcement was seeking to search the Homeport Storage facility in order to build a drug case against Block. As part of that investigation, law enforcement could have and should have searched Block's home — regardless of what Musar or anyone else said about what Block had access to — as he had been arrested possessing narcotics and the same confidential informant who was reliable enough to justify his arrest had tipped law enforcement about his marijuana grow. Moreover, by the morning of June 12, Block had given law enforcement consent — and the keys — to search his apartment. However, the federal agents and municipal police officers persisted in questioning Musar, this time to manufacture a crime beyond that they were investigating. The agents never needed Musar's statement, in practice or in theory, to make their case against Block or to conduct a lawful search of the premises. At most, the effect of any misstatement by Musar delayed law enforcement access to the apartment until they complied with the Fourth Amendment and obtained a search warrant.

In addition the jurisprudential growth of the false statements statute, facts on the ground have extended its reach. With the usually helpful and effective proliferation of local multi-agency and multi-jurisdiction task forces, federal agents now routinely work with local law enforcement. Consequently, the reach of "agency jurisdiction" has stretched even further, and theoretically encompasses any statement made to any law enforcement personnel so long as it relates somehow to a crime that theoretically could be charged federally.

A. The rapid sequence of events — and likely misunderstandings — leading up to Musar's indictment and conviction overshadowed law enforcement's central inquiry.

When the officers first reached Homeport Storage on June 10, the DEA agent, Conan Becknell, called a number for management posted on the locked office door. An employee of the storage company answered, and when Becknell asked for permission to search the premises, the employee told Becknell he was not authorized to grant such permission. However, he did offer to immediately call the owner, Musar, and ask him to call the officer. The officers asked for Musar's cell phone number, but the employee explained he could not give the number out. Becknell asked if Block had a "storage unit" there, and the employee told him Block did not.

The officers grew impatient and called the employee a second time several minutes later. He answered and explained that he had reached Musar,

but he was tied up on business in Odessa (locking out an errant storage unit tenant as it turned out), and would call them back shortly. The employee later testified that the agents were aggravated during both calls.

A short time later around 4 p.m., Musar called as promised. Becknell asked him the same question he had asked the storage facility employee: whether Block had a "storage unit" there? Musar replied that he did not, but when questioned further stated that Block was an employee and had access to private storage areas which he called "lock ups" at the facility used by his construction company to store supplies, as well as to the public area, namely a courtyard where customers could drive into the perimeter of the facility to access their units. Becknell did not ask if Block lived or had lived at the facility. Becknell asked for permission to search and for permission to run a K-9 unit on the premises so if the dog alerted to a particular unit, they could seek a search warrant for that unit. Musar declined and told the officer he wanted to speak to his attorney first and asked that the officers get a search warrant. Musar was concerned about liability to his customers should he consent without consulting counsel. Moreover, as he later testified, the agent told him Block had consented to a search of his "storage unit" — an assertion that put Musar on guard as he knew Block did not have a storage unit. Musar immediately tried to reach his attorney, calling his business number only to find it disconnected.

The DEA agent had another meeting across town and left his local law enforcement colleagues at the facility to wait. Less than thirty minutes later, law

enforcement impatience growing, Mitchell Russell, a Midland city police officer who worked with the DEA via a local task force, called Musar again asking for permission to run a K-9 unit on the premises. Musar again refused and stated he wanted to speak to his attorney first but had been unable to reach him. Musar told Russell he would locate his attorney in the morning and call him back. This second June 10 conversation took place in less than two minutes and was subject to highly conflicting testimony at trial.

Officer Russell had previously searched the Midland police records for information about Block and knew he had previously listed his address as 3806 West Loop 250, the storage facility address. Russell testified at trial that Musar definitively stated that Block did not live at the facility and had never lived there, although Russell could not point to any such false or definitive statement in contemporaneous police reports. Musar testified that his second call with an officer that day included no question about where Block lived.

The next morning, Musar went to his attorney's office only to find the drapes drawn and the mail piled up on the floor, leading Musar to assume his attorney was on vacation. Musar called the attorney's home and left a message. Unknown to Musar, his attorney had closed his practice to become a public defender and also was out of town taking his wife to the doctor. Consequently, it took several days for the lawyer to return Musar's calls.

On June 12, Block who had now been in jail for a week[1] decided to cooperate, spoke to an Odessa police officer, and confirmed he did not have a "storage unit" at the facility but had lived in a studio apartment in a tower which was visible above the facility. Block gave the officer permission to search the apartment, told him where to find the keys in his pick-up truck impounded in the police yard, and described what could be found at the apartment, namely a dismantled hydroponic growing system and a small amount of marijuana. At trial, Block explained that he had purchased some marijuana seeds via the Internet, but had only been able to grow a few plants that he and his friends had smoked.

Rather than simply go forth with the search, the officers called Musar back, attempting to record the conversation. This time Becknell questioned Musar more precisely on Block's access to the facility, asking if Block lived there, to which Musar who did not know the officers were attempting to record the call replied that he had allowed Block to stay there from time to time when he was not staying in college dorms. The recording malfunctioned so that only Becknell's questions are heard while Musar's responses are largely unintelligible. This partial recording was admitted into evidence and heard by the jury during its deliberations.

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[1] Although he had been incarcerated for a week on drug charges, Block apparently did not have a lawyer. *See* TEX. CODE CRIM. PROC. arts. 1.051(a), (c), 14.06(a), 15.17 (requiring prompt presentment of charges and appoint of counsel if requested); *see also Rothgery v. Gillespie Co.*, 554 U.S. 191 (2008).

Law enforcement, including city policeman Russell, called Musar two more times that day, questioning him again about Block. At one point, Musar asked agent Becknell whether Block was still incarcerated. Upon learning that he was, Musar when to see him in the Odessa jail and arranged for his college-student employee to have an attorney. As the officers were waiting for a search warrant and the keys to the apartment (which the Odessa officer had failed to bring to the search), Musar arrived at the facility, and the agents again questioned him yet again, this time confronting him and informing him he had made criminally false statements even as he assisted them in the search.

B. The circumstances of Musar's trial illustrate the extremity to which an unchecked false statement charge can reach.

In his motion for directed verdict, Musar argued that his statements were not material and not capable of naturally influencing agency action because the agents could have simply obtained a search warrant. The Government argued that the statements were material because the officers "left and decided to work on the case some more." At closing argument, the Government argued the June 10 statements about Block's access to the facility were material because the officers "actually didn't go get a warrant that night."

The investigation here was not about Musar but about Block's drug activities. To the extent the false statement statute has moved beyond affirmative statements to the Government to obtain a benefit, it

has been directed at the direct lies of targets of an investigation denying the very subject matter of the investigation. *E.g.*, *United States v. Lupton*, 620 F.3d 790 (7th Cir. 2010); *United States v. Boffil-Rivera*, 607 F.3d 736 (11th Cir. 2010). The statute was never intended to sweep up imprecise answers of incidental and peripheral witnesses. But in the hands of impatient and inconvenienced police officers, as applied below, it did just that.

The officers did not define what they meant by "facility" when they asked after asking whether Block has a "storage unit" there to what areas of the facility Block had access. Musar told them he had keys to "lock ups" where his construction company stored materials. And, in fact, the entrance to the apartment was through one of these private storage area used by Musar's businesses. Thus, from Musar's point of view, an accidental game of "Who's on First?" lead to a federal crime despite a prohibition on perjury convictions for ambiguous questions and literally true answers.

Ultimately, Musar was convicted for the June 10 count of a false statement by the testimony of Midland city policeman, Mitch Russell. Russell, who impatiently called Musar back after Musar had told his colleague, the DEA agent, he wanted to talk to his lawyer and preferred that law enforcement get a search warrant, testified vehemently that Musar definitively told him Block did not live and had not lived there. However, no contemporaneous police report indicated any such false statement. He also

testified that Musar "had built the apartment for" Block, when multiple witnesses, including Block testifying under a limited grant of immunity,[2] testified and documentary evidence showed the apartment was pre-existing and had been part of the building's original construction years earlier. But without any legal threshold for "material" a jury was able to quickly convict Musar.

That conviction was predictable, given the zealous prosecution at a false statement trial that transformed it into a drug trial. During trial the Government complained that Musar had gotten Block out of jail and provided him with an attorney as part of repeated insinuations that Musar knew of and was covering up the anemic "marijuana grow."

Here, the Government used the false statement statute to create an altogether new case against a citizen who had nothing to do with the crime the DEA was pursuing — other than to be a property owner who insisted on asserting his and his customers' Fourth Amendment rights and who wished to speak to his attorney before consenting to any search. Musar's statements did not "pervert governmental functions." But if law enforcement may claim that those statements were material because they required obtaining a search warrant rather than searching without one, that does pervert the government function of complying with the Constitution.

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[2] Law enforcement so focused on Musar that the initial drug dealer target, the central query, avoided prosecution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

April 2011

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[FILED: December 21, 2011]

No. 09-51177
Summary Calendar

D.C. Docket No. 7:09-CR-169-1

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

WILLIAM DAVID MUSAR
Defendant – Appellant

Appeal from the United States District Court for the Western District of Texas, Midland Odessa

Before JOLLY, GARZA and STEWART, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged the Musar's conviction as to count one is affirmed; and the conviction as to count two is vacated and the judgment of the District Court is modified to impose only a $100 special assessment. Any money paid by Musar in excess of $100 toward the erroneous special assessment should be refunded.

ISSUE AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By:_____
Deputy

New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[FILED: December 21, 2010]

No. 09-51177
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WILLIAM DAVID MUSAR

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:09-CR-169-1

Before JOLLY, GARZA and STEWART, Circuit Judges.

PER CURIAM*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

William David Musar appeals his jury convictions for two counts of making a false statement to Drug Enforcement Administration (DEA) agents in violation of 18 U.S.C. § 1001(a)(2). Musar was sentenced to concurrent terms of three years of probation, a $5,000 fine on count one, and a $100 special assessment on each count.

DEA agents questioned Musar, the owner of the Homeport storage facility, regarding whether Mitchell Block, an employee, was growing marijuana there. The Government alleged Musar falsely stated that Block only had access to a storage area for supplies and had no keys to the facility. At trial, it was undisputed that Block had lived in an apartment at the facility and had a key to the apartment.

Musar contends that the district court erred in admitting evidence of Block's marijuana growing activities and the drug-related items found in his apartment as well as evidence that Musar stated he would have known if someone was growing marijuana at the facility because he would have noticed a change in the electricity bill. Evidence of Block's marijuana cultivation was relevant to whether the investigation was a matter within the jurisdiction of the DEA, an element of the offense. *See* § 1001(a)(2); *United States v. Najera Jimenez*, 593 F.3d 391, 399 (5th Cir. 2010). The evidence had little probative value because the element was established by other evidence. However, even if the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, we are not convinced "there is a reasonable probability that the improperly admitted evidence contributed to the conviction." *United States v. Sumlin*, 489 F.3d 683,

688 (5th Cir. 2007). Therefore, the error in admitting the evidence was harmless. *See id.*; FED. R. CRIM. P. 52(a).

The evidence regarding Musar's familiarity with indoor marijuana cultivation was irrelevant. *See* FED. R. EVID. 401. However, because there is no indication that the evidence contributed to the verdict, the error was harmless. *See Sumlin*, 489 F.3d at 688.

Musar also contends there was insufficient evidence the statement alleged in count one of the indictment, that the only part of the Homeport storage facility to which Block had access was a supply area, was false. Musar argues his interpretation of the "Homeport storage facility" as including only storage areas was as reasonable as the Government's intended meaning that it included all areas of the facility regardless of their use. However, a reasonable jury could have found that Musar understood he was being asked about Block's access to the entire facility and his statement that Block only had access to a supply area was false. *See United States v. Brown*, 459 F.3d 509, 529 (5th Cir. 2006) (analyzing a conviction under 18 U.S.C. § 1623(a)); *cf. United States v. Bell*, 623 F.2d 1132, 1137 (5th Cir. 1980) (same). Therefore, the conviction as to count one is affirmed.

Finally, Musar contends there was insufficient evidence he told agents that Block had no keys that would provide him access to the Homeport storage facility as alleged in count two of the indictment. The agents testified that Musar told them Block had keys to a supply area and the facility's office. However, the agents did not testify that Musar told them Block had

no keys to the facility, and Musar denied making such a statement. Therefore, the jury could not have found the essential elements of the offense in count two beyond a reasonable doubt. *See United States v. Shum*, 496 F.3d 390, 391 (5th Cir. 2007). Accordingly, the conviction as to count two is vacated.

The conviction as to count one is AFFIRMED. The conviction as to count two is VACATED, and the district court's judgment is MODIFIED to impose only a $100 special assessment. Any money paid by Musar in excess of $100 toward the erroneous special assessment should be refunded.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-51177

[FILED: February 1, 2011]

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

WILLIAM DAVID MUSAR
Defendant – Appellant

Appeal from the United States District Court for the Western District of Texas, Midland Odessa

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ON PETITION FOR REHEARING EN BANC AND REHEARING EN BANC

(Opinion 12/21/10, 5 Cir., _____, _____ F.3d _____)

Before Circuit Judges JOLLY, GARZA and STEWART.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in the regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CARL E. STEWART
United States Circuit Judge

APPENDIX B

[SEALED]
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

[FILED: June 24, 2009]

UNITED STATES OF AMERICA,	§	
	§	
	§	
Plaintiff,	§	**CRIMINAL NO. MO09CR169**
	§	
vs.	§	
	§	**INDICTMENT**
	§	**[Vio: 18 U.S.C. § 1001– Making False Statements to Federal Agents]**
WILLIAM DAVID MUSAR,	§	
	§	
Defendant.	§	

THE GRAND JURY CHARGES:

COUNT ONE
[18 U.S.C. § 1001(a)(2)]

That on or about June 10, 2009, in the Western District of Texas, the Defendant,

WILLIAM DAVID MUSAR

knowingly and willfully made a materially false, fictitious and fraudulent statement to agents of the Drug Enforcement Administration, to-wit, telling agents that the only part of the Homeport storage facility to which Mitchell Block had access was a storage area for supplies.

A. In truth and in fact, as MUSAR well knew, Block had an apartment at and within the Homeport storage facility, which apartment MUSAR had constructed for Block.

B. The investigation into the circumstances surrounding Block's activities at the Homeport storage facility was a matter within the jurisdiction of the Drug Enforcement Administration.

In violation of Title 18, United States Code, Section 1001(a)(2).

COUNT TWO
[18 U.S.C. § 1001(a)(2)]

That on or about June 12, 2009, in the Western District of Texas, the Defendant,

WILLIAM DAVID MUSAR,

knowingly and willfully made a materially false, fictitious and fraudulent statement to agents of the Drug Enforcement Administration, to-wit, telling agents that Mitchell Block had no keys that would provide him access to the Homeport storage facility.

A. In truth and in fact, as MUSAR well knew, Block had keys that gave him access the Homeport storage facility, and an apartment therein.

B. The investigation into the circumstances surrounding Block's activities at the Homeport storage facility was a matter within the jurisdiction of the Drug Enforcement Administration.

In violation of Title 18, United States Code, Section 1001(a)(2).

A TRUE BILL.

/s/ FOREPERSON
FOREPERSON OF THE GRAND JURY

JOHN E. MURPHY
Acting United States Attorney
/s/

JOHN S. KLASSEN
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

[FILED: September 16, 2009]

UNITED STATES OF AMERICA	§	
	§	
	§	
vs.	§	**MO-09-CR-169**
	§	
	§	
WILLIAM DAVID MUSAR,	§	
	§	
Defendant.	§	

VERDICT FORM

Answer "not guilty" or "guilty."

COUNT ONE

We the Jury find that Defendant **WILLIAM DAVID MUSAR** is _____[Guilty]_____ of the offense
Not Guilty/Guilty
charged in Count One of the Indictment.

COUNT TWO

We the Jury find that Defendant **WILLIAM DAVID MUSAR** is _____[Guilty]_____ of the offense
Not Guilty/Guilty
charged in County Two of the Indictment.

[9/16/09]
DATE

_____
JURY FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

[FILED: October 29, 2009]

UNITED STATES OF AMERICA	§	
	§	
	§	
vs.	§	**MO-09-CR-169**
	§	
	§	
WILLIAM DAVID MUSAR,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is the Motion for a New Trial (Doc. No. 42) of the Defendant William Musar ("Defendant"). The Motion argues that Defendant should be given a new trial because (1) the Court erred by admitting testimony that violated Federal Rule of Criminal Procedure 16(a)(1)(A); (2) the Court erred by denying Defendant's request to instruct the jury on his good faith defense; and (3) the evidence was legally insufficient for a conviction. For the reasons explained below, the Motion will be denied.

I. BACKGROUND

The Court begins by reviewing the pertinent facts. From September 14 through September 16, 2009, this Court held a jury trial on this matter. The indictment charged the Defendant with two counts of giving a materially false statement to agents of the

Drug Enforcement Administration ("DEA"). Both statements pertained to the ability of an individual named Mitchell Block to access a particular storage facility. Prior to the trial, Defendant requested that the Government disclose any statements made by the Defendant to Government agents which the Government intended to use at trial. Due to a likely "paperwork error," however, the Defendant's discovery request was never received by the Assistant United States Attorney prosecuting this case. Government's Response (Doc. No. 43) at 1. Consequently, the requested statements were never disclosed. During the trial, Mitch Russell of the Midland Police Department testified on direct examination from the Government that the Defendant made false statements to him relating to Mitchell Block's lack of access to the storage facility at issue in this case. Such statements were of the exact type that were subject to the Defendant's discovery request. The Defendant, however, did not object to the testimony until the Court took a recess and Russell had been excused as a witness, which occurred after an extensive direct, cross, and redirect examination.

After both sides rested their case, the Defendant moved the Court to instruct the jury on a good faith defense. *See* Proposed Instruction (Doc. No. 33). Among other things, the instruction would have charged that, "[a]n honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct" and that Defendant could only be convicted if the jury determined that he "knowingly" made a false statement to government agents. *Id.* After considering the motion, the Court found that

the jury instructions were adequate without the proposed good faith instruction and denied Defendant's request.

On September 16, 2009, the jury returned a verdict finding the Defendant guilty on both counts of the indictment. On September 24, 2009, the Defendant filed the instant Motion for a New Trial (Doc. No. 42).

II. ANALYSIS

Defendant's Motion for a New Trial raises three issues: (1) that the Court erred in admitting the testimony of Mitch Russell because of the Government's failure to disclose the Defendant's oral statements pursuant to the discovery request; (2) that the Court erred in failing to charge the jury on the Defendant's proposed "good faith" instruction; and (3) the Court erred in denying Defendant's motion for acquittal pursuant to the Federal Rules of Criminal Procedure Rule 29. The Court will address each of these arguments.

A. Rule 16 Violation: Testimony of Mitch Russell

The first problem that Defendant must overcome in his argument that the Court erred by admitting the testimony of Russell is his own failure to timely object to the testimony. It is well known that in order to preserve an evidentiary issue for review, a defendant must object to the evidence's admission in a timely manner. Fed. R. Evid. 103(a)(1). Generally, an objection must be made "contemporaneous" with the admission of the evidence to be timely. *See United States v. Martinez*, 962 F.2d 1161, 1166 (5th Cir. 1992) (finding defendant did not preserve objection to the admission of testimony regarding his

gang membership, noting that defendant's objection was "not contemporaneous" to its admission). It has also been said that "an objection must be 'made as soon as the ground of it is known, or reasonably should have been known to the objector.'" *United States v. Meserve*, 271 F.3d 314, 324 (1st Cir. 2001) (quoting *United States v. Check*, 582 F.2d 668, 676 (2d Cir. 1978)). Therefore, while a defendant does not, in all circumstances, need to object contemporaneously to certain evidence's admission to preserve error, he, at the least, must object as soon as it "becomes obvious" that the questioning is objectionable. *Meserve*, 271 F.3d at 324 (noting that there is some deference in a "hotly contested criminal trial"). Under the present circumstances, it should have been immediately obvious to the Defendant that Russell was testifying to statements that were not disclosed pursuant to the discovery request. In order to preserve error, therefore, he was required to object contemporaneous to the statements' admission into evidence. He failed to do so and, consequently, failed to preserve error.

Because the Defendant's objection was untimely, in order to be granted a new trial he must show that admission of the statements was plain error; that is, "obvious, substantial, and so basic and prejudicial that the resulting trial lacks the fundamental elements of justice." *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1097 (5th Cir. 1991). It is the Defendant's burden to establish plain error, and to do so he must show: (1) that error occurred, that is, the court deviated from a legal rule; (2) that the error was "plain" which requires showing that the error was "obvious, clear, or so conspicuous that the

trial judge and prosecutor were derelict in countenancing them;" and (3) that the plain error affected substantial rights, meaning the error was prejudicial to the outcome of the proceeding. *United States v. Puckett*, 505 F.3d 377, 384 (5th Cir. 2007).

Here, Defendant cannot show the error was plain. Without an objection from the Defendant to the admission of the statements, the Court had no way of knowing that the Government failed to disclose it under the discovery request. It was therefore not "obvious" or "clear" to the Court that the statements were objectionable at the time they were admitted. *Puckett*, 505 F.3d at 384. Additionally, Defendant cannot show actual prejudice. Once Russell testified to the statement, the Defendant cross examined Russell at length regarding the truthfulness of his testimony and his failure to write a report regarding the statement. Defendant has not identified how his trial strategy or cross examination of Russell would have differed if he were provided the statement before trial. Moreover, there was sufficient evidence to convict the Defendant without Russell's testimony because DEA Agents Conan Becknell and Bill Stone also testified to false statements made by Defendant. The Defendant, therefore, has not identified how he was prejudiced by the Rule 16 violation.

Relevant to this finding by the Court is the Tenth Circuit's decision in *United States v. Martinez*, 455 F.3d 1127 (10th Cir. 2006). There, the court held that the district court did not abuse discretion by denying the defendant's motion for a mistrial where the Government violated Rule 16(a)(1)(A), the defendant failed to timely object, and there was no showing of bad faith on the part of the Government. *Id.* at 1129-

31. Each of these elements are present here. The Court did not commit plain error by admitting Russell's testimony.

Finally, the Court finds no merit to Defendant's contention that the Rule 16 violation was tantamount to a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Defendant's reliance on *Brady* and *United States v. Agurs*, 427 U.S. 97 (1976) is misplaced. Those decisions address the government's constitutional obligation to disclose exculpatory or impeachment evidence to a criminal defendant[1] and the evidence at issue here is clearly inculpatory and unfavorable to the defense. *Brady* and *Agurs*, therefore, do not apply to the present matter. The Court's admission of Russell's statements are not grounds for a new trial.

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[1] *Strickler v. Greene*, 527 U.S. 263, 281-82 (noting that the first element of a Brady violation is "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"); *United States v. Agurs*, 427 U.S. 97, 107 (1976) ("We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty. ... We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution."). *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

B. Good Faith Instruction

Next, Defendant argues that the Court erred by denying his request that the jury be instructed on his good faith defense, Defendant cites two cases to support this argument: *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir. 1981), and *United States v. Fowler*, 735 F.2d 823, 828-29 (5th Cir. 1984). Although each of these cases concluded that the district court committed an abuse of discretion by omitting a good faith instruction, they have be abrogated by subsequent Fifth Circuit caselaw. *See United States v. Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986) (noting that with respect to *Goss* and *Fowler*, "later caselaw has effectively by-passed these decisions"). As the Fifth Circuit recently opined in *United States v. Frame*: "[s]ince Hunt, we have held that the omission of a good faith jury instruction is not an abuse of discretion if the defendant is able to present his good faith defense to the jury through, inter alia, witnesses, closing arguments, and the other jury instructions." No. 05-20908, 2007 WL 1544990 at *18 (5th Cir. May 25, 2007). Here, the Defendant was permitted to present his good faith defense through his own testimony, through witnesses, and in his closing argument. Furthermore, the Court's Jury Instructions adequately explained the gist of Defendant's proposed good faith instruction: that in order to convict the Defendant, the jury must find that he made the statements *knowing* they were false. *See* Court's Instructions to the Jury (Doc. No. 34) at 7, 9 (instructing that to find Defendant guilty, the jury must find that he "made the statement knowing that it was false"); *Id.* at 10 (instructing that "knowingly"

means "voluntarily and intentionally" and "not because of mistake or accident"). Therefore, the Court did not err by refusing to instruct the jury on good faith; Defendant's argument has no merit.

C. Insufficient Evidence

The remaining argument to be addressed is Defendant's request for a new trial because the evidence was legally insufficient for a conviction. Under the standard for reviewing a claim of legal insufficiency, a verdict must be affirmed "if a reasonable trier of fact could conclude . . . the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence to support the verdict." *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007) (internal quotations omitted). This standard leaves the assessment of the credibility of the witnesses as well as the weight of the evidence within the exclusive province of the jury. *United States v. El-Zoubi*, 993 F.2d 442, 445 (5th Cir. 1993). Based on this standard, and after careful analysis of the record, the Court finds that the evidence was sufficient to support a reasonable juror's finding of guilt beyond a reasonable doubt on all of the essential elements of the charged offenses.

III. CONCLUSION

For the foregoing reasons, the Court enters the following ORDER:

The Defendant's Motion for a New Trial (Doc. No. 42) is DENIED.

SIGNED this 27 day of October, 2009.

/s/ROBERT JUNELL
ROBERT JUNELL
United States District Judge
Western District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

[FILED: December 18, 2009]

UNITED STATES OF AMERICA	§	
	§	
	§	
vs.	§	**Case No. 7:09-CR-169-01**
	§	**USM Number 17933-280**
	§	
WILLIAM DAVID MUSAR,	§	
Defendant.	§	

JUDGMENT IN A CRIMINAL CASE

(For Offenses committed On or After November 1, 1987)

The defendant, WILLIAM DAVID MUSAR, was represented by Joe Kendall/Hal Brockett.

The defendant was found guilty on Count(s) One (1) and Two (2) by a jury verdict on September 16, 2009 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offenses.

Title& Section	Nature of Offense	Offense Ended	Count(s)
18 U.S.C. § 1001(a)(2)	Making False Statements to Federal Agents	June 10, 2009 June 12, 2009	1 2

As pronounced on December 17, 2009, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 18th day of December, 2009.

/s/ROBERT JUNELL
ROBERT JUNELL
United States District Judge

* * *